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Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS M-02–153 OF 2005 AND M-02–154 OF 2005
GOPAL SRI RAM, HELILIAH AND AHMAD MAAROP JJCA
9 MAY 2008

C

Civil Procedure — Appeal — Fact, finding of — Interference by appellate court — Judicial appreciation of evidence — Whether trial judge misdirected upon material fact

D

Civil Procedure — Res judicata — Issues, similarity of — Test to be applied — Whether plea of res judicata can succeed

E

Contract — Specific performance — Availability of — Abandonment of right of specific performance — What constitutes abandonment — Whether respondent had opted for monetary compensation in lieu of specific performance

F

Airport Auto Centre Sdn Bhd, the first third party in the court below (Airport Auto) and beneficial owner of an undivided share in a piece of land held under Lot 28 (the property), entered into an agreement on 10 June 1993 to sell the property to the defendant/respondent (respondent) at a purchase price of RM200,000. Later, on 9 December 1994, Mdm Chun, the second third party, transferred the property to the appellant. Thereafter the plaintiff/appellant (appellant) brought an action in the High Court against the respondent to recover vacant possession of the property and consequential relief. The respondent delivered a counterclaim seeking specific performance against the appellant and an order against Mdm Chun that she caused the appellant to specially transfer the property to the respondent and damages for breach of contract against Airport Auto. The trial judge dismissed the appellant's claim and entered judgment on the counterclaim against the appellant and Mdm Chun. These appeals were based on that judgment. The first appeal by the appellant and the second by Mdm Chun which arose from the same civil suit were heard together. The appellant's main grounds of appeal were that the counterclaim was barred by res judicata, that the remedy of specific performance was not available to the defendant and that the trial judge had erred because he had not undertaken a judicial appreciation of the evidence before him and in consequence had misdirected himself.

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Held dismissing the appeals with costs:

(1) The plea of res judicata in this case was based on an earlier summons for an interlocutory mandatory injunction by the respondent against a company called Jaytra Sdn Bhd. To constitute res judicata, the 'earlier judgment must necessarily and with precision determine the point in issue'. When this test is applied to the facts in this present case, it would appear that the decision in the injunction application did not necessarily and with precision determine the point in issue in this appeal. The points in issue before the trial judge in the present instance were whether the agreement of 10 June 1993 was a true sale and purchase agreement or a guarantee or security agreement to enforce a loan made by the respondent to Airport Auto and whether Airport Auto had repaid the sum of RM282,000 to the respondent. These issues were not at stake in the earlier proceedings and therefore the plea of res judicata could not succeed (see paras 5 & 6).

(2) The appellant contended that the respondent had abandoned its remedy of specific performance and in support, thereof relied on cl 5 of the agreement of 10 June 1993, and claimed that the respondent had opted for monetary compensation in lieu of specific performance. The said clause 5 stipulates that the sale and purchase agreement shall be void on the happening of an event which Airport Auto can by its own act or omission bring about. If this clause was to be given effect, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the respondent's claim for specific relief. To do so would be to permit Airport Auto to take advantage of its own wrong. Settled authority has held that a party cannot rely on its own wrong to defeat the opponent's claim (see paras 7 & 8).

(3) In any case, cl 5 on its true construction does not amount to an abandonment by the respondent of its right to the remedy of specific performance. In fact, there is nothing in the agreement of 10 June 1993 from which such an abandonment may be inferred. To succeed on a plea of abandonment it must be shown that the innocent party has either expressly or by necessary implication abandoned the remedy of specific performance. In the absence of an express abandonment, cogent evidence is necessary to support a plea of implied abandonment. There is no evidence of express or implied abandonment in this case (see para 9).

(4) The appellant's argument that the remedy of specific performance cannot be had against the appellant because it was not a party to the agreement of 10 June 1993 was without merit. There is a specific finding by the trial judge, based on para 23 of Madam Chun's defence, that at all material times the appellant was Madam Chun's nominee and that Airport Auto was her agent. The evidence on record fairly supports

A the inference that the transfer of the property by Mdm Chun to the appellant was an attempt to evade the contractual obligations that Airport Auto owed to the respondent under the agreement dated 10 June 1993. The trial judge accordingly pierced the corporate veil of the appellant and Airport Auto as he was clearly entitled to base on
B established authority. It therefore transpired that Mdm Chun by taking advantage of the transfer to the appellant was evading the contractual obligations she (in effect being the alter ego of Airport Auto) owed the defendant under the agreement of 10 June 1993. Accordingly there is no bar for the decree of specific performance being enforced against the
C appellant (see paras 10 & 11).

(5) The argument advanced by the appellant that there was a change of the shareholders of the appellant company since the events giving rise to the present litigation and it could not be held responsible for what the
D earlier shareholders had done is without merit. This is because a company is a separate and distinct entity from its shareholders and a change in the latter does not effect a change in the identity of the former (see para 13).

E (6) The final submission by the appellant that the judge did not judicially appreciate the evidence before him when adjudicating upon the issues in dispute also cannot be supported. A critical examination of the judge's evaluation disclosed that the trial judge had not misdirected himself upon any material particular. As such, it is the duty of this court
F to defer to the finding of fact by the trial judge on the issues presented to him for decision (see paras 14-16).

[Bahasa Malaysia summary

G Airport Auto Centre Sdn Bhd, pihak ketiga pertama di Mahkamah Tinggi ('Airport Auto') dan pemilik benefisial bahagian yang tak dibahagi di dalam sebidang tanah yang dipegang di bawah Lot 28 ('harta tanah'), telah memasuki satu perjanjian pada 10 Jun 1993 untuk menjual harta tanah tersebut kepada defendan/responden pada harga belian sebanyak
H RM200,000. Kemudian, pada 9 Disember 1994, Puan Chun, pihak ketiga kedua, telah memindahkan harta tanah tersebut kepada plaintif/perayu. Seterusnya perayu membawa tindakan di Mahkamah Tinggi terhadap responden untuk mendapatkan milikan kosong harta tanah tersebut dan relif yang berkaitan. Responden telah menyerahkan tuntutan balas memohon
I perlaksanaan spesifik terhadap perayu dan perintah terhadap Puan Chun bahawa beliau yang menyebabkan perayu secara spesifiknya memindahkan harta tanah kepada responden dan ganti rugi bagi perlanggaran kontrak terhadap Airport Auto. Hakim bicara telah menolak tuntutan perayu dan telah memasukkan penghakiman terhadap tuntutan balas terhadap perayu

dan Puan Chun. Rayuan ini adalah berdasarkan kepada penghakiman tersebut. Rayuan pertama oleh perayu dan kedua oleh Puan Chun yang timbul daripada guaman sivil yang sama telah didengar bersama. Alasan rayuan utama perayu adalah tuntutan balas adalah terhalang oleh prinsip res judicata, yang mana tiada remedi perlaksanaan spesifik bagi defendan dan hakim bicara telah terkhilaf kerana beliau tidak menghargai secara kehakiman keterangan di hadapannya dan menyebabkan beliau telah tersalah arah.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Rayuan bagi res judicata dalam kes ini adalah berdasarkan kepada saman terdahulu bagi injunksi mandatori interlokutori oleh responden terhadap sebuah syarikat yang dikenali sebagai Jaytra Sdn Bhd. Untuk membentuk res judicata, 'penghakiman awal mestilah berkepentingan dan dengan penentuan yang tepat terhadap perkara di dalam isu'. Apabila ujian ini digunakan terhadap fakta dalam kes ini, ianya menunjukkan bahawa keputusan di dalam permohonan injunksi tidak perlu dan dengan tepat menentukan perkara di dalam isu rayuan ini. Perkara dalam isu di hadapan hakim bicara di dalam kes ini adalah, sama ada perjanjian 10 Jun 1993 adalah perjanjian jual beli yang sebenar atau satu jaminan atau perjanjian sekuriti untuk menguatkuasakan pinjaman yang telah dibuat oleh responden kepada Airport Auto; dan sama ada Airport Auto telah membayar semula sejumlah RM282,000 kepada responden. Isu-isu ini tidak dinyatakan di dalam prosiding awal dan oleh itu rayuan berkenaan dengan res judicata tidak boleh berjaya (lihat perenggan 5-6).

(2) Perayu menegaskan bahawa responden telah mengabaikan remedi perlaksanaan spesifiknya dan dalam menyokongnya bergantung kepada klausa 5 perjanjian bertarikh 10 Jun 1993, dan menyatakan bahawa responden telah memilih untuk pampasan kewangan menggantikan perlaksanaan spesifik. Klausa 5 tersebut menyatakan bahawa perjanjian jual beli akan terbatal apabila Airport Auto dengan sendirinya melakukan atau tidak melakukan sesuatu perkara. Jika klausa ini diberikan kesan, ianya membawa maksud bahawa Airport Auto boleh bergantung kepada kegagalannya sendiri untuk melengkapkan penjualan dan oleh itu menggagalkan tuntutan responden bagi relief spesifik. Untuk melakukannya, Airport Auto perlu dibenarkan untuk mengambil kesempatan atas kesalahannya sendiri. Autoriti yang telah ditetapkan memutuskan bahawa sesuatu pihak tidak boleh bergantung kepada kesalahannya sendiri untuk menggagalkan tuntutan pihak lawan (lihat perenggan 7-8).

(3) Walau bagaimanapun, klausa 5 di atas tafsiran sebenarnya tidak merupakan pengguguran oleh responden terhadap remedi perlaksanaan

spesifik. Sesungguhnya, tidak terdapat apa-apa di dalam perjanjian bertarikh 10 Jun 1993 di mana pengguguran tersebut boleh disimpulkan. Untuk berjaya dalam rayuan pengguguran ianya mestilah menunjukkan bahawa pihak yang tidak bersalah telah sama ada secara jelas atau implikasi menggugurkan remedi perlaksanaan spesifik. Dalam ketiadaan pengguguran yang jelas, keterangan yang meyakinkan adalah penting untuk menyokong rayuan bagi pengguguran secara tersirat. Tidak terdapat keterangan pengguguran yang jelas atau tersirat dalam kes ini (lihat perenggan 9).

(4) Pernyataan perayu bahawa remedi perlaksanaan spesifik tidak boleh dikenakan terhadap perayu kerana ia bukanlah pihak kepada perjanjian bertarikh 10 Jun 1993 adalah tidak bermerit. Terdapat dapatan spesifik oleh hakim bicara berdasarkan kepada perenggan 23 pembelaan Puan Chun bahawa pada keseluruhan masa yang material perayu adalah penama Puan Chun dan Airport Auto adalah agennya. Keterangan yang direkodkan secara adilnya menyokong kesimpulan bahawa pemindahan harta tanah oleh Puan Chun kepada perayu adalah satu cubaan untuk mengelak tanggungjawab kontrak bahawa Airport Auto terhutang terhadap responden di bawah perjanjian bertarikh 10 Jun 1993. Hakim bicara dengan sewajarnya menembusi tirai korporat perayu dan Airport Auto yang mana beliau secara jelasnya adalah berhak untuk mendasarkan kepada autoriti yang kukuh. Oleh itu, ianya diketahui bahawa, Puan Chun dengan mengambil kesempatan terhadap pemindahan kepada perayu cuba mengelak kewajipan kontraknya (sebagai *alter ego* (personality kedua) Airport Auto) yang berhutang kepada defendan di bawah perjanjian bertarikh 10 Jun 1993. Sewajarnya, tidak terdapat halangan bagi dekri perlaksanaan spesifik untuk dikuatkuasakan terhadap perayu (lihat perenggan 10-11).

(5) Pernyataan yang dikemukakan oleh perayu bahawa terdapat pertukaran pemegang saham perayu memandangkan kejadian yang timbul hingga litigasi sekarang ini dan ianya tidak boleh dikatakan bertanggungjawab bagi apa yang dilakukan oleh pemegang saham yang dahulu adalah tidak bermerit. Ini adalah kerana, sebuah syarikat adalah entiti yang berlainan dan berbeza daripada pemegang sahamnya dan pertukaran kemudiannya tidak memberikan kesan pertukaran identiti yang terdahulu (lihat perenggan 13).

(6) Hujahan terakhir oleh perayu bahawa hakim tidak menghargai secara kehakiman keterangan di hadapannya apabila membuat keputusan terhadap isu-isu yang dipertikaikan juga tidak boleh disokong. Pemeriksaan kritikal atas penilaian hakim mendedahkan bahawa hakim bicara tidak menyalah arahkan dirinya terhadap mana-mana butiran yang penting. Oleh yang demikian, adalah tugas mahkamah ini untuk

mengikut dapatan fakta oleh hakim bicara berkenaan dengan isu-isu yang dikemukakan kepadanya untuk diputuskan (lihat perenggan 14-16).]

Notes

For cases on fact, finding of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 898–1004

For cases on issues, similarity of res judicata, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6076–6078

For cases on specific performance in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5081–5153

Cases referred to

Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd [1985] 2 MLJ 165 (refd)

Ardeshir v Sassoon AIR 1928 PC 208 (refd)

Carl-Zeiss v Rayner & Keeler [1967] 1 AC 853 (refd)

Clarke v Edinburgh & District Tramways Co [1919] SC 35 (folld)

Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprises Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor as third parties) [2005] 5 MLJ 64 (refd)

Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd [2000] 4 MLJ 737 (refd)

Jones v Lipman [1962] 1 All ER 442 (refd)

Keet Gerald v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49 (refd)

New Zealand Shipping Company Ltd v SDAECD France [1919] AC 1 (refd)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd [1996] 3 MLJ 533 (refd)

Tong Lee Hwa v Lee Yoke San [1979] 1 MLJ 24 (refd)

Appeal from: Civil Suit No 22–72 of 1997 (High Court, Malaccca)

Firoz Hussein (Dominic J Puthucheary & Cheng Mai with him) (Puthucheary Firoz & Mai) for the appellants in Civil Appeal No M-02–153 of 2005.

Wong Kim Fatt (Yong Chen Lim & Wong Boon Lee with him) (Yong Chen Lim & Saridah) for the respondents in Civil Appeal No M-02-153 of 2005.

Ng Kong Peng (J Amardas with him) (KP Ng & Amardas) for the appellant in Civil Appeal No M-02–154 of 2005.

Wong Kim Fatt (Wong Boon Lee with him) (Yong Chen Lim & Saridah) for the respondent in Civil Appeal No M-02–154 of 2005.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] There are two appeals before us. The first is civil appeal No M-02–153 of 2005; the second is civil appeal No M-02–154 of 2005. Both appeals arise from the same civil suit that was tried by the High Court in Melaka. The judgment to the High Court is reported in [2005] 5 MLJ 64. The first appeal is by the plaintiff in the court below. The second appeal is by Madam Chun, the second third party in the court below. We heard arguments in these appeals on 28 and 29 April 2008 and adjourned them for delivery of judgment to today.

[3] The brief facts relevant to these appeals are as follows. On 10 June 1993, a company called Airport Auto Centre Sdn Bhd ('Airport Auto'), the first third party in the court below, as beneficial owner, entered into an agreement with the defendant in the court below (respondent before us) to sell an undivided share in a piece of land held under Lot 208 ('the subject property'). The purchase price was RM200,000. Later, on 9 December 1994, Madam Chun caused the subject property to be transferred to the plaintiff. Later still, the plaintiff brought an action against the defendant to recover vacant possession of the subject property and consequential relief. The defendant delivered a counterclaim seeking specific performance against the plaintiff, an order against Madam Chun that she cause the plaintiff to specially transfer to the defendant the undivided share in the subject property and damages for breach of contract against Airport Auto. The learned judge dismissed the plaintiff's claim and entered judgment on the counterclaim both against the plaintiff and against Madam Chun.

[4] Before us, the plaintiff relied on three grounds in support of its appeal. First, that the counterclaim was barred by res judicata. Second, that the remedy of specific performance was not available to the defendant. Third, that the learned judge had erred in not undertaking a judicial appreciation of the evidence led before him in consequence of which he misdirected himself. We will deal with each of these points in turn.

[5] To appreciate the argument raised on the plea of res judicata, it is necessary to narrate some of the factual background on which the plea is based. After the commencement of proceedings, the defendant took out a summons for an interlocutory mandatory injunction. Its application was based on an agreement dated 20 October 1991 between itself and a company called Jaytra Sdn Bhd. Under that agreement the defendant was given the right to extract sand from the subject property. At the date of that agreement

Jaytra had been wound up. However, Madam Chun's husband, Wu Soo Hwa purported to act as the general manager of Jaytra. He appointed himself and Madam Chun as its directors. Tribute on the sand mined from the subject property was paid by the defendant to Madam Chun. All this was, of course, wholly illegal. The judge who heard the defendant's application for an injunction dismissed it. An appeal to this court failed. The judgment of this court is reported in [2000] 4 MLJ 737. It is clear from a reading of the judgments of Siti Norma Yaakob and Abu Mansor JJCA that the issue that was dealt with upon that occasion was the validity of the mining agreement which the defendant had with Jaytra. To illustrate the point we need do no more than quote the following sentence from the judgment of Siti Norma Yaakob JCA:

> I have already pointed out that no such right existed as it [the defendant] cannot derive any advantage or right under the first agreement [with Jaytra] which it has admitted is unenforceable.

[6] It is also pertinent to note that in an application for an interlocutory injunction; whether mandatory or prohibitory; the primary question for the court is whether the justice of the case warrants the grant of relief. See, *Keet Gerald v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. It is upon that issue that this court made its pronouncement in its earlier decision. Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the merits of the case appear to have been discussed. The comments in these passages are mere obiter dicta and do not constitute the ratio of the case. It is only the ratio of the case which is binding between parties to a dispute or their successors. See, *Carl - Zeiss v Rayner & Keeler* [1967] 1 AC 853. Further, to constitute res judicata, 'the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p 53, 'necessarily and with precision' determine the point in issue'. See, *Tong Lee Hwa v Lee Yoke San* [1979] 1 MLJ 24, per Chang Min Tat FJ. If you apply that test to the facts here, the decision of this court in the earlier case did not necessarily and with precision determine the point in issue in this appeal. The points at issue before the trial judge in the present instance were:

(i) whether the agreement of 10 June 1993 was a true sale and purchase agreement or a guarantee or security agreement to recover a loan made by the defendant to Airport Auto; and

(ii) whether Airport Auto had repaid the sum of RM282,000 to the defendant.

These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of res judicata cannot succeed.

A [7] We now take the second argument on which the plaintiff's appeal is based. The question here is whether the defendant had abandoned its remedy of specific performance. The plaintiff says that it did and advances two reasons for this. In the first place, by reason of cl 5 of the agreement of 10 June 1993, the defendant had opted for monetary compensation in lieu B of specific performance. In the second place, the plaintiff was never a party or privy to the agreement of 10 June 1993. You cannot enforce an agreement against a non-party. So the arguments go.

C **[8]** Now, cl 5 on which the plaintiff relies read as follows:

> In the event that the Vendor fails to complete the sale and purchase of the said property the Vendor shall refund the Deposit Sum to the Purchaser and such refund shall be guaranteed by Mr Wu Soo Hwa (NRIC No. 3395041) and this Agreement is deemed terminated and is null and void henceforth.

D If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim. In *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 at p 304, E Wan Hamzah SCJ when delivering the judgment of the Supreme Court said:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act F or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1.

G So too here. Clause 5 is a stipulation that the sale and purchase agreement shall be void on a happening of an event which Airport Auto can by its own act or omission bring about. Hence, it cannot be permitted either to insist upon the clause or to compel the defendant who is blameless to insist upon H it. To do so would be to permit Airport Auto to take advantage of its own wrong.

[9] The second ground upon which we would reject the argument based on cl 5 is that the clause on its true construction does not amount to an I abandonment by the defendant of its right to the remedy of specific performance. Indeed, there is nothing in the agreement of 10 June 1993 from which such an abandonment may be inferred. To succeed on a plea of abandonment it must be shown that the innocent party has either expressly or by necessary implication abandoned the remedy of specific performance.

In the absence of an express abandonment cogent evidence is necessary to support a plea of implied abandonment. An example of an express abandonment is the case of *Ardeshir v Sassoon* AIR 1928 PC 208, where some nine months before the trial of the action the plaintiff's solicitor formally notified the defendant that the plaintiff had decided to abandon his claim for specific performance.

[10] As for the argument that the remedy of specific performance cannot be had against the plaintiff because it was not a party to the agreement in question, we consider this to be without merit for two reasons. First, there is a specific finding by the learned judge based on para 23 of Madam Chun's defence that at all material times the plaintiff was Madam Chun's nominee and that Airport Auto was her agent. The evidence on record fairly supports the inference that the transfer of the subject property by Madam Chun to the plaintiff was nothing more than an attempt to evade the contractual obligations that Airport Auto owed the defendant under the agreement dated 10 June 1993. The learned judge accordingly pierced the corporate veil of the plaintiff and Airport Auto. Based on established authority he was clearly entitled to do this.

[11] In *Jones v Lipman* [1962] 1 All ER 442, the owner of a piece of land agreed to sell it to the plaintiffs. However, pending completion, he sold and transferred the land to the defendant company of which he and his solicitors' clerk were the only shareholders and directors. In an action by the plaintiff for a decree of specific performance it was argued that the defendant company being a separate and distinct entity was not amenable to the decree because it was a bona fide purchaser and not a party to the original agreement. However Russell J had no difficulty in repelling this argument on the ground that the company was a device and a sham, a mask used by the defendant to 'avoid recognition by the eye of equity'. Closer to home, in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 533 at p 543, Chong Siew Fai CJ (Sabah & Sarawak) said that:

> In cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligation or duties, the court would disregard the notional separateness of the companies.

So too here. Madam Chun by taking advantage of the transfer to the plaintiff was evading the contractual obligations she (in effect being the alter ego of Airport Auto) owed the defendant under the agreement of 10 June 1993. Accordingly there is no legal bar for the decree of specific performance being enforced against the plaintiff.

[12] There is a further reason advanced by the learned judge with which we agree for rejecting the arguments that the specific performance cannot be had against the plaintiff because it was not a party to the agreement in question. Clauses 20 and 21 of the agreement dated 10 June 1993 bind both Airport Auto and the plaintiff as its successor in title. These clauses read as follows:

> In this Agreement where the context so admits the term 'the Vendor' or 'the Purchaser' shall include their respective successor-in-title and permitted assigns and when there are two or more persons included in the term 'the Vendor' or 'the Purchaser' their liabilities under this agreement shall be joint and several. Words importing masculine gender shall be deemed and taken to include the feminine and neuter gender and the singular to include the plural and vice versa.
>
> This Agreement shall be binding upon the parties hereto their successor-in-title, permitted assign, heirs and personal representative respectively.

[13] There is a further point we must mention. It was suggested during argument that since the shareholders of the plaintiff company had changed since the events giving rise to the present litigation, it could not be held responsible for what the earlier shareholders had done. This argument is without merit because it overlooks the most fundamental of company law principles: that a company is separate and distinct entity from its shareholders. A change in the latter does not effect a change in the identity of the former. In *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165, all the shareholders of the defendant company in that case had sold their shares to a buyer. The company owned an estate in which the plaintiffs were employed. The question arose whether the sale of the shares had resulted in a sale of the estate. Shankar J said:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company. Authority for this proposition should be found in any textbook on law relating to companies (but see *Halsbury's Laws of England* 4th Ed Vol 7 paras 1, 82 and 100.)
>
> In the present case there was no change whatsoever in the constitution of Ladang Rengo Malay Estate Sdn Bhd. The company did not change its identity or personality …

[14] We now turn to the third submission made in support of the appeal. It has to do with the complaint that the judge did not judicially appreciate the evidence before him when adjudicating upon the issues in dispute. This

is the sole ground on which submissions were advanced by learned counsel for Madam Chun although it must be said in fairness to him that he adopted the submissions made by learned counsel for the plaintiff on the other points already discussed earlier in this judgment. The two issues that were formulated for the judge to determine have already been adverted to earlier in this judgment. They are both fact sensitive. After a very careful scrutiny and analysis of the evidence the learned judge came to the conclusion that the agreement of 10 June 1993 was a genuine sale and purchase agreement and not a guarantee or security agreement to recover a loan made by the defendant to Airport Auto and that the latter had not repaid the sum of RM282,000 to the defendant.

[15] We have been taken through the evidence both by learned counsel for the plaintiff and Madam Chun in an effort to demonstrate that the learned judge had not sufficiently appreciated or evaluated it. We have very carefully examined the complaints made and subjected the learned judge's evaluation of the evidence to critical examination. Having done so we are satisfied that he did not misdirect himself upon any material particular. He disbelieved, as he was entitled to do, the testimony of the witnesses called by the plaintiff and Madam Chun. What then is our function as a Court of Appeal in a case such as this? We think that the answer has been provided by Lord Shaw of Dunfermline in his speech in *Clarke v Edinburgh & District Tramways Co* [1919] SC 35 (HL) at p 36, where His Lordship says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

A **[16]** Adopting the approach in the above quoted passage, it is our duty to defer to the finding of fact made by the learned judge on the issues presented to him for decision.

B **[17]** For the reasons already given, both appeals before us are dismissed. The orders made by the High Court are affirmed. The appellant in each appeal must pay the costs thereof to the respondent who shall be entitled to present a bill of costs against each appellant with a separate entitlement to getting up against each of them. The deposit in each appeal shall be paid out to the respondent to account of its taxed costs.

C *Appeals dismissed with costs.*

Reported by K Nesan

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